WILLIAM TENG CHEE KIANG

v.

SEA-LAND SERVICE INC.

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[SUIT NO. 1769]
6 JULY 1991

LABOUR LAW: *Employment - Severance pay - Termination - Whether "with prejudice" - Method of termination - Construction of Rules of Employment - Letter of termination not specific - Effect of - Where terms are ambiguous - To be construed in favour of employee - Redundancy or retrenchment - Meaning of redundancy - Appraisal report.*

The plaintiff began his employment with the defendant on 8 January 1972 as a probationary officer in the post of Office/Accounting Manager. Thereafter, the plaintiff received several promotions, the latest being that of Port Operations Manager; he also received merit increases to his salary. On 10 September 1988, the plaintiff was informed by the defendant that he had been given an 8% merit increase of $738 per month with effect from 1 July 1988. The next salary review was scheduled for 1 July 1989.

By a letter dated 31 July 1989, the defendants terminated the plaintiff's employment, whereby he was given 3 months pay *in lieu* of notice effective 1 August 1989.

On 20 September 1989, the plaintiff commenced this action and claimed, *inter alia*, severance pay under the terms of his employment as set out in the defendant's Rules of Employment (the Rules). The plaintiff alleged that it was an express or implied term and condition of his employment that he would be paid severance pay equivalent to at least one month's salary, or ½ month's salary based on his last drawn salary rate for each calendar year of service, whichever was higher if he was not dismissed from employment or the same terminated "with prejudice" as defined in the defendant's Rules. He further submitted that his termination of employment was neither a dismissal nor a termination "with prejudice", and that accordingly he was entitled to severance pay.

The defendants contended that the plaintiff's services were terminated "with prejudice" as the defendants found him incompetent to perform his job.

The plaintiff was given judgment on his claim for severance pay under the terms of his employment with the defendants.

This was the defendant's appeal against the decision, whereby they contended that even if the plaintiff's employment was not dismissed "with prejudice", the plaintiff was not entitled to severance pay.

Held:

[1] If the defendant's intention was to terminate the plaintiff "with prejudice" they should have done so explicitly; on the evidence they had failed to do what they alleged they had intended to do, in the letter of termination. Further the evidence was not consistent with termination having resulted from redundancy/retrenchment. The defendants failed to show that the termination was "with prejudice".

[2] The plaintiff was given 3 month's notice, and the additional 2 months pay *in lieu* of notice was not severance pay but notice pay and therefore the defendant could not claim that they gave the plaintiff severance pay in the absolute discretion under Article 3.12 in relation to "termination with prejudice".

[3] No inference of "termination with prejudice" could be made from the facts. The defendants were merely seeking to re-write the terms of the letter of termination and if the notice of termination was ambiguous in any respect it should be construed in favour of the plaintiff.

[4] The articles in the Rules of Employment prescribed all the available causes of termination of employment. Accordingly, if the plaintiff's termination did not result from any cause which denied him severance pay, it must have resulted from a cause which entitled him to severance pay. As the plaintiff's employment was not terminated "with prejudice" he was entitled to severance pay.

[5] In the circumstances, it was reasonable to conclude that the services of the plaintiff were redundant in the ordinary sense. His services were no longer required for the job, because some other person was required to do it.

[6] The defendant's interpretation of Article 5.3A relating to redundancy or retrenchment, that is, that a redundancy would occur only if the post of Port Operations Manager was abolished, was too narrow and contrary to express terms contained therein. Further, the requirement that an employee could not be placed elsewhere within the business reinforced the broader interpretation that redundancy referred to an employee's services and not the post he was holding. Again if Article 5.3A was ambiguous, it should be construed in favour of the employee.

[7] The appraisal report was an annual report to decide whether the plaintiff should be given any merit increase. It was not marked as a special report, as one would have expected if it were intended for the purpose of deciding whether the plaintiff should be dismissed from service from incompetence or otherwise. Further, the appraisal was an open appraisal, as the appraiser was required to discuss his evaluation with the plaintiff. As the defendants had not done this, defendants were in breach of their own appraisal procedure. The appraisal report was consistent with the plaintiff's termination having resulted from redundancy or retrenchment.

[8] The appraisal report was not evidence of habitual failure, either in respect of faithful or satisfactory performance, much less both. The finding in the report was that he was not suitable for the job. The plaintiff's employment was not therefore terminated "with prejudice" but resulted from redundancy or retrenchment.

[Judgment for the plaintiff with costs.]

Cases referred to:
Hindle v. Percival Boats Ltd. [1969] 1 All ER 836 ***(dist)***
North Riding Garages Ltd. v. Butterworth [1967] 1 All ER 644 ***(dist)***

For the plaintiff/appellant - Robert Yu
For the defendants/respondents - Chua Lee Ming

JUDGMENT

Chan Sek Keong J:

The defendants have appealed against my decision giving judgment for the plaintiff on his claim for severance pay under the terms of his employment with the defendants.

The plaintiff was first employed by the defendants on 8 January 1972 as a probationary officer in the post of Office/Accounting Manager. On 22 April 1972, he was confirmed in his post at the salary of $1,250 per month. On 1 May 1976, he was appointed to the post of Singapore Terminal Manager at a salary of $2,840 per month, and then to the post of Port Operations Manager on 1 August 1976. By 1 July 1984, his monthly salary had been increased to $8,128 following a 6% merit increase of $460 with effect from 1 July 1984. The increase was made under the defendants' "1984 Merit Increase Guidelines". On 1 July 1985, the plaintiff was given another 6% merit increase of $488 per month. No merit increase was given to him for the period 1 July 1986 - 30 June 1987. It was not disputed that the plaintiff was not given a merit increase because of a worldwide freeze of staff salaries by the defendants.

On 1 July 1987, the plaintiff was given a 7% merit increase of $603 per month. On 10 September 1988, the plaintiff was informed by the defendants that he had been given an 8% merit increase of $378 per month with effect from 1 July 1988. The next salary review was, in accordance with the past practice, to take place on 1 July 1989.

Within a year, the plaintiff fell from grace as by a letter dated 31 July 1989, the defendants terminated the plaintiff's employment in the following terms:

> *Re: Termination of Employment*
>
> Reference is made to the letter of confirmation of employment to you dated 22 April 1972 whereby it was stated one month's notice or pay *in lieu* thereof will be given if the company decide to terminate your employment.
>
> Your are hereby given three months pay *in lieu* of notice with effect from 1 August 1989. A cheque for the payment due to you will be sent to you shortly.
>
> You need not turn up for work on the said date of 1 August 1989.

On 20 September 1989, the plaintiff commenced this action and claimed, *inter alia*, severance pay under the terms of his employment as set out in the defendant's Rules of Employment, the relevant articles of which were as follows:

Article 1.1 *Purpose*

> These Rules establish the basic terms and conditions of employment of all "Employees" hired by Sea-Land Service and its subsidiaries, hereinafter referred to as "employer". The matters regarding employment which are not set forth herein shall be as provided for in governmental regulations.
>
> Employer reserves the right to amend, add, or delete Rules of Employment at any time at his discretion, subject to applicable governmental regulations and approval by Asia Administration Manager.

Article 3.12 Severance Pay

> (A) *Severance pay will be granted to permanent, full-time salaried employees whose termination results from the installation of labour-saving devices, redundancy, retrenchment, or termination without prejudice. Severance pay for termination with prejudice is at the absolute discretion of employer*. Further definition is provided in the section entitled "Termination of Employment". (Emphasis is mine)

(B) Severance pay will be equivalent to at least one month's salary, or to one-half month's salary for each calendar year of service, whichever is higher. For purposes of computation, a fraction of at least six (6) months worked is considered as one whole year. The pay shall be based on the employee's latest salary rate, unless the same was reduced by the employer to defeat the intention of these provisions.

(C) Severance pay will not be granted upon death, voluntary retirement, resignation, or disciplinary dismissal. An employee discharged during his probationary period will not be given severance pay unless unusual circumstances are present and such pay is at the absolute discretion of the employer.

Article 5.3 *Termination*

An employee who falls under any of the following categories shall have his employment terminated and be provided with one moth's notice or one month's salary *in lieu* of notice at the discretion of the employer:

(A) Redundancy/Retrenchment

When the business no longer requires employee's services and employee cannot be plead elsewhere within the business, within the particular country employed.

(B) Termination without Prejudice

(1) An employee who has notified the employer and who is absent from work beyond accumulated sick leave for an unreasonable length of time for injury, illness or other like cause which is not sustained during working hours and which is not covered by law or Ordinance. The determination of "an unreasonable length of time", if not established by law, is at the absolute discretion of employer, however, normally deemed to be 60 calendar days.

(2) An employee who has been found to be suffering from a disease and whose continued employment is prohibited by law or is prejudicial or his health or the health of other employees.

(C) Termination with Prejudice

Employees are expected to perform their work diligently and faithfully, and may be subject to disciplinary action and termination of employment on any one of the following grounds:

(1)(1) Habitual lateness or absenteeism without justification.

(2) Habitual failure in faithful and satisfactory performance of duties.

(3) Habitual disruption of good order of employer's organisation.

(4) Failure to strictly observe Employer's Rules of Employment.

(5) Other major misconduct - An employee who has received two written reprimands in reference to any one of the preceding within a period of 365 days and has not shown significant improvement in performance, will be terminated.

Article 5.4 provided for "disciplinary dismissal", that is, summary dismissal for various types of misconduct which were not relevant to this action.

In his statement of claim, the plaintiff avered, in para. 4 thereof, that it was an express or implied term and condition of his employment that upon the termination of his employment he would be paid, *inter alia*, severance pay equivalent to at least one month's salary, or ½ month's salary based on his last drawn salary rate for each calendar year of service, whichever was higher, if he was not dismissed from employment or the same terminated "with prejudice"

as defined in the defendants' Rules of Employment. Paragraphs 6 and 7 averred that his termination of employment was neither a dismissal nor a termination "with prejudice", and that accordingly he was entitled to severance pay.

The plaintiff applied for summary judgment. The defence as disclosed in the affidavits filed on behalf of the defendants was that the plaintiff's services were terminated "with prejudice" as the defendants found him incompetent to perform his job. The defendants were given unconditional leave to defend. On this basis, the dispute between the parties was whether the plaintiff had been dismissed "with prejudice". On appeal, it was also disputed by the defendants that even if the plaintiff's employment was not dismissed "with prejudice", the plaintiff was not entitled to severance pay.

How did the Defendants Terminate the Plaintiff's Employment?

On the first issue, the letter of termination was practically self-explanatory. It did not say that the plaintiff's employment was terminated "with prejudice". On the contrary, it gave the plaintiff 3 months' notice. That was how his employment was terminated.

Counsel for the defendants however contended that the termination was "with prejudice" because that was what they had intended to do. As evidence of such intention, Counsel relied on the annual appraisal report dated 28 July 1989 relating to the plaintiff's work performance for the previous year. The plaintiff's performance was found wanting. The finance director went so far as to allege that the plaintiff was incompetent. I shall consider the report later, but the short answer to this submission was that if that were their intention, they had failed to give effect to it in the letter of termination. My finding was simply that on the evidence, the defendants failed to do what they alleged they had intended to do, and further that the evidence was not inconsistent with termination having resulted from redundancy/ retrenchment. It was incumbent upon the defendants to show that the termination was "with prejudice". I was not persuaded. If the defendants had intended to terminate the plaintiff's services "with prejudice", they would have done so explicitly, as they did in a letter dated 25 September 1989 in respect of another employee. The said letter reads:

> *Re-Notice of Termination with Prejudice of your Service with Sea-Land Service Inc.*
>
> In view of your poor and unsatisfactory performance during the past year, the management after careful review, regrettably have to terminate your service with the company with immediate effect as per our company policy s. 5 of Article 5.3 C 1(2).
>
> *In lieu* of the notice period, the company will pay you 1 month salary as per our company policy s. 5 Article 5.3 which provides that "An employee who falls under any of the following categories (in this case, termination with prejudice s. 5 Article 5.3 C 1(2) shall have his employment terminated and be provided with one month's notice or one month's salary *in lieu* of notice at the discretion of the employer.

Counsel for the defendants also argued that the termination could be construed as or was "without prejudice" as the plaintiff was given 2 months *ex gratia* payment, and that the defendants could have dismissed him summarily but they did not do so because of his 17 years of service with them. There was, in my view, no substance in this argument. In actual fact, the plaintiff was given 3 months' notice and not 2 months' *ex gratia* payment. The defendants were not obliged to give him 3 months' notice. But they did. The additional 2 months' pay *in lieu* of the notice was not severance pay but notice pay, and therefore the defendants could not even claim that they gave the plaintiff severance pay in their absolute discretion under Article 3.12 in relation to "termination with prejudice". Again, if they had wanted to give him severance pay, they could have said so. Moreover, the allegation relating to summary dismissal could not be right since it had never been suggested nor was there

any evidence that the plaintiff had committed any of the acts that justified summary dismissal under Article 54. In my view, no inference of "termination with prejudice" could be made from these facts. The defendants were merely seeking to re-write the terms of the letter of termination. If the notice of termination were ambiguous in any respect, it should be construed in favour of the plaintiff.

The next argument of Counsel for the defendants was that since the letter of termination was made in neutral terms, it did not follow that the termination resulted from redundancy or retrenchment as to attract severance pay. This raised a question of construction of the Rules of Employment. In my view, these Rules set out a code of employment for all employees. Articles 1.1, 3, 12, 5.3 and 54, when read together, provide a scheme whereby an employee could only be dismissed for certain causes. If he was dismissed summarily for misconduct (Article 5.4) or "with prejudice" (Article 5.3), he would not be entitled to severance pay. He was also not entitled to severance pay if he resigned, retired voluntarily or died (Article 3.12C). In all other cases, he was entitled severance pay. These other cases were terminations resulting from the installation of labour saving devices, redundancy, retrenchment and termination without prejudice. These articles prescribed all the available causes of termination of employment. Accordingly, as a matter of logic, if the plaintiff's termination did not result from any cause which denied him severance pay, it must have resulted from a cause which entitled him to severance pay. As the plaintiffs employment was not terminated "with prejudice", he was entitled to severance pay.

Meaning of Redundancy

Counsel for the defendant also contended that the plaintiff's termination could not have resulted from redundancy because he was found incompetent. He cited the decision of *North Riding Garages Ltd. v. Butterworth* [1967] 1 All ER 644 and *Hindle v. Percival Boats Ltd.* [1969] 1 All ER 836 as authority for the proposition that inability to meet the employer's standards is not dismissal on account of redundancy. In my view, these decisions were not relevant to the instant case. Here, the expression "redundancy/retrenchment" was defined in Article 5.3A as "When the business no longer requires the employee's services and the employee cannot be placed elsewhere within the business, within the particular country employed."

Did the circumstances leading to the termination of the plaintiff's employment fall within the definition? The affidavit of the finance director disclosed that (a) on 7 January 1989, the defendants had recruited a new administration manager and (b) the total cost of the defendants in replacing the plaintiff was more than that of the plaintiffs. Prior to 7 January 1989, the plaintiff was also doing the work of the administration manager. As the plaintiff's services were terminated on 31 July 1989, this meant the plaintiff had in fact appointed another person to do part of the job the plaintiff was allegedly incapable of doing, and after 31 July 1989, to do the job of port operations manager as well. In the circumstances, it was reasonable to conclude that the services of the plaintiff were redundant in the ordinary sense. His services were no longer required for the job, because some other person was required to do it. Counsel for the defendants contended that Article 5.3A applied only to the type of services for which the employee was employed. In other words, a redundancy would occur only if the post of port operations manager was abolished. In my view, this interpretation was not only too narrow, it was also contrary to the express terms of Article 5.3A. Furthermore, the requirement that an employee could not be placed elsewhere within the business reinforced the broader interpretation that redundancy referred to an employee's services and not the post he was holding. Again, if Article 5.3A were ambiguous, it should be construed in favour of the employee.

I should now explain why I found the appraisal report not inconsistent with the plaintiff's termination having resulted from redundancy/retrenchment. The appraisal report was a report of the plaintiff's performance for the period of 1 July 1988 to 30 June 1989. The date of the next appraisal as stated in the report itself was 1 July 1990. The plaintiff's performance was graded:

(1) "satisfactory for technical work performance" which consisted of land operations, marine operations, maintenance, cost control and budget, and relationship with PSA but;

(2) "inadequate" for "management work performance" which consisted of planning function (forecasting, development objectives, programming, etc), organising function (developing organisation structure, delegating, etc), leading function (decision making, communicating, etc.), and controlling function (establishing performance standards, measuring performance, etc).

Performance meant that the performance and results achieved met most critical objectives, high priority specific objectives, position requirements and performance standards. Performance was "highly effective" when it **consistently** met the said objectives, "satisfactory" when it **generally** met such objectives, and "inadequate" when it did **not** meet the said objectives.

It was not disputed that on 20 July 1988, the plaintiff had been assessed "highly effectively" /"satisfactory" in both his technical work performance and his management work performance, so that his alleged inadequacy in respect of his management work performance in the ensuing year could only have manifested itself between 21 July 1988 to 28 July 1989. The finance director in paras. 7 and 8 of his affidavit of 21 November 1989 stated that by September 1988 the plaintiff was found wanting. Notwithstanding this, and surprisingly, the defendants by a letter dated 10 September 1988 confirmed a merit increment of 8% for the plaintiff with effect from 1 July 1988. The finance director alleged in para. 9 of the same affidavit that the increase was given to boost his morale. This was simply not true, as it was a merit increase for his performance during the previous year. These statements were in consistent and had little credibility.

The appraisal report was, and marked, as an annual report of performance to enable the defendants to decide whether the plaintiff should be given any merit increase. It was not marked as a special report, as one would have expected if it were intended for the purpose of deciding whether the plaintiff should be dismissed from service for incompetence or otherwise. Furthermore, the appraisal was an open appraisal, as the appraiser was required to discuss his evaluation with the plaintiff. The appraiser did not discuss his evaluation with the plaintiff. The defendants were in breach of their own appraisal procedure.

Finally, the defendants could only terminate the plaintiff's employment "with prejudice" on the ground, in the circumstances of this case, of "habitual failure in faithful and satisfactory performance of duties". Apart from the appraisal report, there was no evidence of such failure. In my view, the appraisal report was not evidence of habitual failure, either in respect of faithful or satisfactory performance, much less both. The finding in the report was that he was not suitable for the job. On the grounds given therein and in the affidavit of the finance director (that the business of the defendants had expanded in 1988 and was likely to expand further etc) it was more probable than otherwise that the job became too onerous for him, and not because of habitual failure to perform his services faithfully and satisfactory. As a result of the expansion of the defendants' business in this sector, the job probably got too big for the plaintiff.

Whether, if the termination had been "with prejudice", the termination was wrongful was not in issue before me, and accordingly I make no finding on it.

For the above reasons, I found that the plaintiff's employment was not terminated "with prejudice" but that it resulted from redundancy or retrenchment. Judgment was given to the plaintiff with costs.

Also found at [1991] 3 CLJ 2026